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NO. 92-490 (4)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF ARIZONA,

Petitioner,

-vs-

FLOYD ORVILLE PETERSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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FACTS

While not directly questioning the reasonableness of Detective Moreno's actions after he checked with Flagstaff police and determined they had a copy of the arrest warrant in their files as well as in the computer, Respondent implies that Moreno should also have checked with the Justice Court that issued the warrant before arresting him. (Brief in Opposition at 2.) Petitioner pointed out at page 6 of the Petition that Detective Moreno discovered the existence of the arrest warrant at 5:00 p.m. The Justice Court was closed.

Petitioner emphasizes that the administrative mistake that occurred here was exactly that: a mistake. Reentry of the warrant into the police computer could not have been a pretext for arresting Respondent because reentry occurred almost 7 months before

Respondent committed the burglary in September 1987.

LAW

a.

Whiteley v. Warden

Respondent contends that "expanding" the good-faith exception of United States v. Leon to cover the instant case "flies squarely in the face of the legal premise" in Whiteley. (Brief in Opposition at 4.) Petitioner disagrees.

Sheriff Ogburn of Carbon County, Wyoming, signed a complaint before a justice of the peace that contained absolutely nothing except Ogburn's conclusion that Harold Whiteley and Jack Daley committed burglaries the day before. Whiteley v. Warden, 401 U.S. 560, 562-63 (1971). The justice of the peace issued an arrest warrant. On the basis of the complaint and warrant, Sheriff Ogburn issued a state-wide radio bulletin for the arrest of Daley and

Whiteley. Id. at 563-64. Relying upon that bulletin, Laramie police arrested Daley and Whiteley. A search of the car revealed tools and old coins taken in the burglaries. Id. at 563. The prosecution used this evidence. Id. at 561.

In deciding Whiteley, this Court's first conclusion, apparently undisputed by the State of Wyoming, was that Sheriff Ogburn's complaint was a mere conclusion devoid of any facts to support probable cause for the issuance of the arrest warrant. Id. at 564-65. The Court rejected the contention that Laramie police independently possessed sufficient information for probable cause to arrest. Id. at 565-67.

Wyoming made one more argument: the Laramie police reasonably assumed that whoever authorized the bulletin had probable cause to seek the arrest of Daley and Whiteley. Id. at 568. This Court said:

> We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

401 U.S. at 568. This Court was saying that where in fact there never was probable cause to support issuance of the arrest warrant, the reliance of the arresting officer on the issuance of the warrant would not suffice to permit introduction of the evidence.

This Court decided Whiteley 13 years before United States v. Leon and before the widespread use of computers in law enforcement. Whiteley had nothing to do with the good-faith exception the Court considered in Leon. On the basis of

affidavits, the officer in Leon obtained a facially valid search warrant. 468 U.S. at 902. A reviewing court later determined that the information in the affidavits was insufficient to establish probable cause, recognized the good faith of the officer who relied upon the magistrate's issuance of the warrant, but refused to create a good-faith exception to the exclusionary rule. Id. at 903-04.

Carving out an exception to the exclusionary rule, this Court said that "the officer's reliance on the magistrate's probable-cause determination, and on the technical sufficiency of the warrant he issues, must be objectively reasonable." Id. at 922. Immediately after that statement the Court included a footnote clarifying that "officer" should be read to include not only those who executed the warrant, but also those who originally obtained it

or provided information material to the probable-cause determination. Id. at 923 n.24. The Court's reference to Whiteley v. Warden was in footnote 24. The citation to Whiteley appears limited to those situations where the officer obtaining the warrant presented only a "bare-bones" affidavit, then relied on the ignorance of his fellow officers to make the search.

Respondent's argument is that the arrest warrant had been recalled (he terms it "invalid"), so it made no difference how the warrant got back into the computer or how reasonable Detective Moreno's reliance was on the information he obtained from the Flagstaff Police Department. That contention misses the crux of Leon, which is the objectively reasonable behavior of the officer under all the circumstances. It was a fact in Leon that the affidavits did not establish probable cause for the search

warrant -- but this Court recognized an exception nonetheless. A key distinction between this case and Whiteley is that Respondent has never questioned that the magistrate who originally issued the arrest warrant had probable cause to do so. Respondent below never made any contention that the officer who originally sought the arrest warrant presented false information or a bare-bones affidavit incapable of establishing probable cause. The adminstrative mistake by which the warrant was reentered into the computer did not invalidate the original conclusion of probable cause to issue the warrant.

The "collective knowledge" premise that Respondent draws from Whiteley may be properly applied when the officer seeking the warrant presents false information or only conclusory allegations to the magistrate -- as Sheriff Ogburn did in

Whiteley. However, under Leon that concept is inappropriate as a basis for suppression when probable cause did exist and police made the arrest on the basis of a mistaken reéntry of the warrant into the computer system. Petitioner reminds the Court that Respondent below never argued, and no state court found, that the Flagstaff police maliciously reentered the recalled warrant, or that the Flagstaff police exhibited a continuing pattern of negligent conduct resulting in repeated mistakes involving warrants.

In short, Respondent's position is that whenever the police, as opposed to the magistrate, make any kind of mistake, the Fourth Amendment mandates suppression of inherently reliable physical evidence. This Court did not say that in Leon and should take this case to make that clear.

b.

Federal Circuits

Respondent says that, with the exeption of one circuit case, there is no disagreement about suppression of the evidence in circumstances of this kind. Clearly the Second Circuit refused to suppress the evidence in a case in which at least the conduct of the New Hampshire authorities in maintaining the arrest warrant could have been found to warrant suppression. United States v. Towne, 870 F.2d 880 (2d Cir. 1989), cert. denied, 490 U.S. 1101 (1990). Although Towne may stretch the limits of Leon -- with indications of deliberate misconduct not present in this case -- the Second Circuit properly focused on the objectively reasonable reliance of the arresting officer on the outstanding New Hampshire warrant.

Respondent has misread the Fifth Circuit's en banc holding in United

States v. De Leon-Reyna, 930 F.2d 396 (5th Cir. 1991) (en banc). Respondent states at page 7 of the Brief in Opposition that the Fifth Circuit upheld the warrantless stop and arrest because "any one of the above factors would have given . . . enough probable cause to stop the welding truck." The district court granted De Leon-Reyna's motion to suppress. The district court concluded that without "the putative false registration . . ., the remaining circumstances do not justify a stop." 930 F.2d at 398. Moreover, the district court found that the Border Patrol Agent's failure to use code words to communicate the license plate numbers created the error leading to the erroneous information relayed to him by the dispatcher. Id. A panel of the Fifth Circuit affirmed, finding insufficient reason for an investigatory stop once the erroneous license plate information was excluded. Id. at 399.

The Fifth Circuit en banc clearly held that the Border Patrol Agent's good-faith reliance on the license report information, "as forming a part of the total circumstances he evaluated in determining whether to stop the vehicle, was objectively reasonable . . . ." Id. at 399. Although in dictum the Fifth Circuit hinted that the stop may not have violated the Fourth Amendment even without the erroneous license plate information, that court specifically stated that it was deciding the case "on the Leon-Williams exception to the exclusionary rule without determining that the stop violated the Fourth Amendment . . . ." Id. at 401 n.5.

After Whiteley, but prior to Leon, the Eighth Circuit upheld the search of a defendant and the vehicle in which he was riding on the basis of computer information that had not been timely updated. In United States v. Stevens, 509 F.2d 683 (8th

Cir.), cert. denied, 421 U.S. 989 (1975), two St. Louis officers observed several traffic violations committed by the driver of a car in which Lawrence Stevens was a passenger. They stopped the car. Upon learning that the driver had no license, they ran a license check and learned that the car was wanted in connection with a burglary committed 3 weeks earlier. 509 F.2d at 686. Subsequently, the police had all occupants get out of the car. In a pat-down frisk, an officer found a shotgun shell in Stevens' pocket. A second officer removed a sawed-off shotgun from beneath the seat where Stevens had been sitting. Id. Evidence at the suppression hearing established that the "wanted" label on the car (in connection with the burglary) should have been removed from the police computer before the officers stopped the car -- but it was not. Id. n.2. The Eighth Circuit upheld the search of Stevens

and the car on the basis of the somewhat stale computer information. Id. at 687-88.

Towne, De Leon-Reyna, and Stevens show that at least three federal circuit courts -- one sitting en banc -- have extended the reasoning of Leon to circumstances involving good-faith reliance upon computer information even when, in one case (De Leon-Reyna), the agent made the mistake that resulted in his receiving erroneous license plate information. Thus, the disagreement with the Arizona Court of Appeals is not limited to just one court, as Respondent would have the Court believe.

c.

State Courts

At page 14 of the petition, Petitioner cited one state supreme court case and three appellate cases from other states that disagree with the reasoning of the Arizona Court of Appeals. The amicus brief filed on October 14 contains additional

citations at pages 4 and 5 to state appellate cases, some in accord with the the Arizona Court of Appeals, and some not in accord.

CONCLUSION

At least three federal circuit courts, one state supreme court, and three other state appellate courts have reached a conclusion diametrically opposed to that of the Arizona Court of Appeals. Several other state supreme courts are in agreement with the reasoning of the Arizona appellate court. The State of Arizona believes that this division in authority, which does exist despite Respondent's attempt to minimize it, and the indisputable fact that the same kind of mistake is bound to recur in this computerized age, warrants the Court's exercise of discretion in reviewing this case.

Petitioner respectfully asks the Court to grant certiorari and to reverse the Arizona Court of Appeals.

DATED this 23rd day of October, 1992.

Respectfully submitted,

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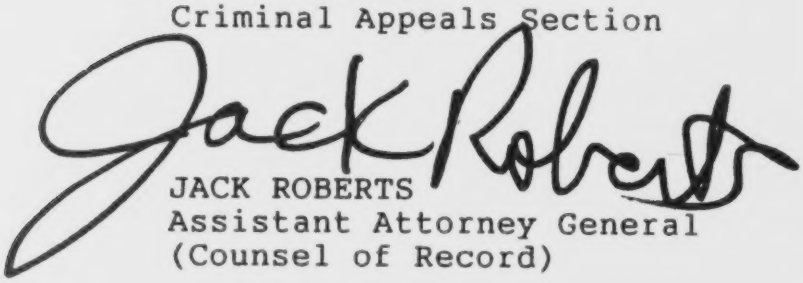

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